The role of the Land and Environment Court in environmental impact assessment

EIS ≠ EIA

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Before embarking upon a commentary on the role of the Land and Environment Court in environmental impact assessment (EIA) it is necessary to dispel some widespread misconceptions. Misconceptions which are probably not shared by any of the participants in this forum but nonetheless perceptions widely held by the media and many members of the public.

We must be careful to distinguish between EIA and the role of an Environmental Impact Statement (EIS). In New South Wales — the only state of which I have any detailed knowledge — an EIS is *not* the decision-making document. In other words EIS does not equal EIA. An EIS is the proponent's analysis of the likely environmental impacts of a proposal. Its purpose is to ensure that the decision-maker is aware of the potential environmental consequences of the proposal. While an EIS is an important part of the decision-making process, it is but one part of it. This needs to be kept in mind. As the Court said in *Prineas* v. *Forestry Commission of New South Wales* ((1983) 49 LGRA 402):

> "An Environmental Impact Statement is not a decision-making end in itself — it is a means to a decision-making end. Its purpose is to assist the decision-maker."

Subject to a recent legislative aberration this is still the law. However, the *Timber Industry (Interim Protection) Act* 1992 (NSW) has hit upon a quaint variation. It goes something like this — carry out the activity, viz., cut down the trees, later do an EIS, later still make the decision to retrospectively validate the approval.

It may be useful to more fully state the requirements of adequacy of an EIS. Quoting again from *Prineas*, Cripps J. states:

> ". . . provided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision-maker and members of the public and the Department of Environment and Planning to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations. The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations. In matters of scientific assessment it must be doubtful whether an environmental impact statement, as a matter of practical reality, would ever address every aspect of the problem. There will be always some expert prepared to deny adequacy of treatment to it and to point to its shortcomings or deficiencies."

The second widely held misconception is a not altogether surprising difficulty on the part of many members of the public and media commentators to distinguish between merit determinations and the powers of the Court in judicial review proceedings. To give an example, if a government determining authority approves the construction of a freeway through a heritage building, and that decision is challenged in the Court, the question for the Court is not a merit one but a legal one. The issue is whether the approval is lawful, not whether it was the right or wrong decision based on a consideration of the merits of the proposal.

These misconceptions have unfortunately muddied the debate on the appropriateness of EIA procedures, the importance of an EIS and the role played by the Court in relation to the validity of an EIS. It must be understood that the Court is unable to express a merit opinion on a challenge to the lawfulness of a decision.

To comprehend the dichotomy it should be appreciated that the Court's involvement in EIA arises in quite distinct ways.

First, appeals by developers from the refusal by local government to consent to the carrying out of designated development. Third party objectors may also appeal from the granting of such a consent. The list of designated developments includes abattoirs, breweries, helipads, canal estates, feedlots, cementworks, brickworks, concrete batching plants, marinas, mines, extractive industries, chemical and petroleum works, oil refineries, pulp and paper works and woodmillers' works etc.

Second, challenges by "any person" under s.123 of the *Environmental Planning and Assessment Act* 1979 (NSW) to the lawfulness of the conduct of a public authority under Part V of the Act. These usually involve one of two circumstances — either a decision not to undertake an EIS or a question of the validity of a decision to approve an activity including the EIA processes underlying that decision.

The former merit appeals involve a factual assessment of the environmental impacts — often including the evidence of a number of relevant expert witnesses. In these proceedings the EIS itself does not play an overly prominent role although it is often a convenient reference point. The impact statement sometimes serves to highlight issues requiring more thorough analysis where a matter is less than adequately covered. In fact the contents of the EIS may on occasions be seen as a starting point for environmental assessment rather than the end of it. It can readily be seen in this context that the question of the "validity" of an EIS becomes somewhat beside the point.

Judicial review on the other hand does not involve the same merit assessment of environmental impacts. The question is often — did the decision-maker take into account to the fullest extent reasonably possible all matters likely to affect the environment by reason of the proposed activity? Sometimes this will arise in the context of a public authority deciding to proceed without an EIS. Another common issue is whether an activity requiring approval is one that is likely to significantly affect the environment. If it is, then an EIS is required. Another possibility is an allegation of a flaw in the decision-making process by a proponent or determining authority, however, in New South Wales they are most usually the same entity.

The two types of litigation differ markedly. The first is a purely administrative appeal. The Court becomes the consent authority and has all of its powers and functions. The rules of evidence do not apply and the Court may inform itself as it thinks fit, and to this end can call its own expert witnesses. The issues are merit and not legal ones. The Court operates with as little formality as necessary. The hearing may be by a technical assessor and not a Judge. In other words the adversary system is modified.

This process is in stark contrast to a legal challenge to the validity of a decision, whether that decision arises under any part of the planning legislation or a variety of other environmental and pollution statutes. Here the rules of evidence apply and the challenge may only be determined by a Judge. Common Law principles of judicial review apply. Questions arise such as, has there been a breach of the statute? Was the decision manifestly unreasonable? Was an irrelevant consideration taken into account? Was a relevant consideration ignored? Was natural justice accorded where those principles are applicable.

However, giving excessive weight to a material factor is generally irrelevant. Weight is a matter for the decision-maker and not for the Court. The Court's jurisdiction is supervisory only. As the Chief Justice of the High Court, Mason J., said in the *Minister for Aboriginal Affairs* v. *Peko-Wallsend Ltd.* ((1985–89) 162 CLR 24):

> ". . . a court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits."

Nonetheless, in these types of challenges, expert evidence is often called to assist the Court in determining whether there has been a relevant breach of the law.

While I can appreciate scientists having grave difficulty in coming to terms with Judges and lawyers' approaches to fact-finding and scientific evidence, it is not all a one-way street. For their part scientists need to understand how courts operate, the applicable standard of proof and acceptance of decision-making based on the balance of probabilities. In my opinion it is crucial that scientists embrace EIA procedures — crucial because of the importance of the decisions taken following environmental assessment. It is only with the participation of scientists in the process that the standard of EIA will rise — thus increasing the quality of the decision-making.

Dr. Fairweather has suggested a number of ways of strengthening EIA procedures. He(1) has discussed the paradox of scientists' reluctance to become involved in the EIA process due to perceived research standards and yet the need for the participation of these same people to improve those standards. I support his suggestions, amongst others, for earlier and greater public involvement and the freer exchange of environmental research information. Dr Fox's(2) suggestions for improving the scientific content of descriptions of the natural environment as well as due acknowledgement of material placed in final statements, are valid concerns that need to be addressed. EISs certainly need to be more professional and accountable, more open or transparent and more susceptible to informed public participation.

However, it must be acknowledged that great progress has been made since we emerged from the dark ages of the 1970s. Any "before" and "after" test cannot but be impressed by the difference a decade has made. Take any major project with multiple environmental impacts. Test how those impacts were assessed in 1980 by comparison with to-day. The contrast is remarkable. A decade ago environmental assessment did little more than scratch the surface. To-day it is far more sophisticated, although I concede that there is much room for improvement of the current model. Since any major changes — such as the partiality of the decision-maker — involve policy decisions you will understand that it is very difficult for a Judge to make any comment unless relevantly made in a Judgment of the Court.

There are, of course, some obvious issues which are material to EIA succeeding in its objectives. One of the most important is the availability of relevant data. Often relevant information is virtually kept under lock and key like money in the bank. Fortunately, these problems have been subsiding in the courts with routine discovery and inspection of documents, fewer claims for privilege (which have mostly been unsuccessful), and the use of subpoenas to produce documents. Most state and local government bodies now routinely produce their documents to the court without argument. Additionally, the *Freedom of Information Act* 1989 (NSW) provides an avenue to obtain information albeit one which is presently hidebound with problems, not the least the expense and numerous exceptions.

From time to time disputes as to ownership of information have been exposed to the Court. Examples that come to mind are the unacknowledged use of material without consent, and often out of context; the "editing" or "moulding" of sub-consultants' work and the intentional omission or misleading synthesis of material or data. Apart from making relevant findings in an individual case, there is little the Court can do about the misdeed. It must be left to the players to pursue their remedies and the issues are often ethical or contractual. Sometimes they may involve questions of intellectual property.

One would hope that the Form 4 author's certification of an EIS is treated seriously as well as the requirements of clause 65 of the Regulation to the *Environmental Planning and Assessment Act*. This Regulation provides that a person shall not submit an EIS knowing that it is false in any material particular; that it contains information that is materially misleading in form or the context in which it appears or that there is an omission of material matter. Breach of this regulation is an offence which can be prosecuted before a Magistrate. Perhaps the EIS certification and the requirements of the Regulation should be treated more seriously by consultants and subconsultants as well as consent and determining authorities. This will better protect the integrity of the process.

While the Courts have consistently decried a test of perfection for the validity of an EIS — for some of the reasons earlier adverted to — there have been and probably will be occasions in the future where it is necessary for the Court to be explicit with its criticism. One such occasion was *Jungar Holdings* v. *Eurobodalla Shire Council* ((1989) 70 LGRA 79) where Hemmings J. concluded:

> "In my opinion, the complaints made by the objectors to the overall adequacy of an EIS, the application, and subsequent details are well founded. Even as amended, it is a pathetic document comprised mainly of general statements, inadequate particulars or description of the development or the activities proposed, and made inadequate or no assessment of impact.
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> . . . on the information supplied in the application, the EIS, or evidence called in these proceedings, I am of the opinion that a consent authority properly discharging its duty could not possibly make the necessary assessment of the development or its impact. The inadequacies of the EIS remain, and the details of the process, the

activities and the land to be used are so uncertain and obscure that I am unable to make any real assessment of its impact. No evidence was called from the author of the EIS to support its conclusions or recommendations. I found expert evidence called by the developer contradictory and unconvincing. Opinions in the main were formed without any real experience or understanding of all of the processes involved, or without any attempt to make a proper assessment. In all of the circumstances this Court could not make a determination of the application according to law otherwise than by refusal, and therefore the only appropriate order is that the appeal be upheld."

While I can understand the chariness of scientists to become immersed in EIA procedures I urge them to participate in the process. Playing their part can only improve the quality of decision-making and help to sustain our environmental values. Indeed, I would go so far as to say that they have a positive duty to contribute. As Professor Harry Recher(3) recently said:

> "Courts that deal with environmental issues require ecological data and they require the interpretation of those data by ecologists."

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Simple journalists *or* simple scientists?: are environmental issues too complex for the media?

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INTRODUCTION

Despite the recession, the environment is a major concern of Australians. Only unemployment is considered more important in the short-term, while the health of the environment dominates such traditionally important issues as the economy, education and welfare in people's perception of their long-term well-being. It is evident that concern for the way we use and manage our natural resources as well as our awareness of environmental degradation and the need for more effective conservation programmes has been incorporated into the way society functions. The issues will change, but the environment will remain on the political and social agenda through this decade and well into the 21st century.

Although there was concern about water pollution, the destruction of forests, soil erosion, and the loss of wildlife early in the 19th century, the public perception of environmental degradation and concern for our environmental future is relatively new. I like to think that it dates to the publication of Rachel Carson's *Silent Spring* in 1961 that brought pollution into the backyards and kitchens of Americans, but its development and growth as a political and social force for change is a product of the media and the advent of mass communication.

Ironically the reporting of environmental events by the media and the popularity of natural history programmes has fostered the development of an environmental ethic in an increasingly urbanized world where decreasing numbers of people ever come into direct contact with natural environments. Although there have been a few key and high profile players such as David Attenborough, Rachel Carson, Paul Ehrlich, and David Suzuki, most of the credit for the development of a public awareness of the environment belongs to the journalists who daily investigate and report on local, regional, national and global environmental events. In my view they have achieved a great deal.